BOOK REVIEWS.

THE SUPREME COURT AND THE CONSTITUTION. By CHARLES A. BEARD, Associate Professor of Politics in Columbia University. New York: THE MACMILLAN CO. 1912. pp. 127.

THE COURTS, THE CONSTITUTION, AND PARTIES. STUDIES IN CONSTITUTIONAL HISTORY AND POLITICS. BY ANDREW C. MCLAUGHLIN, Professor of History in the University of Chicago. Chicago, Ill.: THE UNIVERSITY OF CHICAGO PRESS. 1912. pp. vi, 298.

POWER OF FEDERAL JUDICIARY OVER LEGISLATION; ITS ORIGIN; THE POWER TO SET ASIDE LAWS; BOUNDARIES OF THE POWER; JUDICIAL INDEPENDENCE; EXISTING EVILS AND REMEDIES. By J. HAMPDEN DOUGHERTY. New York: G. P. PUTNAM'S SONS. 1912. pp. xiii, 125.

MAJORITY RULE AND THE JUDICIARY, AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION. By WILLIAM L. RANSOM of the New York Bar. With an introduction by THEODORE ROOSEVELT. New York: CHARLES SCRIBNER'S SONS. 1912. pp. xxiii, 183.

As the simultaneous publication of these four books would indicate, a careful and thorough examination is being made of the peculiar doctrine of American Constitutional Law, according to the courts in the absence of clearly granted constitutional authority both the right and the duty in proper cases of declaring unconstitutional acts of the legislature which to the judicial mind appear violative of the Constitution. Professors of law and of history, members of the bar, even judges themselves, have of recent years been writing both tract and treatise with the idea of proving or disproving that it was the intention of the framers of our Constitution that the courts should exercise this power. At times the conflict is shifted from the ground of history and the pros and cons as to the expediency of continuing in force our peculiar doctrine are set forth with all that wealth of argument and illustration which commonly characterize constitutional controversies.

The first stage in this reëxamination of the political soundness of the peculiar American doctrine consisted in asking whence and how did the judges derive this peculiar authority? The endeavor to answer this question resulted in filling the law reviews with articles which sought to prove from an examination of extant documents that the courts were either usurpers or grantees, and in the writing of at least one ambitious work, described as one of vast learning, which goes over the whole general subject of the judicial power from the broadest field of jurisprudence. This is the late Brinton Coxe's JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION. It is to this stage of the subject that Professor Beard's, Professor McLaughlin's and Mr. Dougherty's books belong. All endeavor to show that it was clearly the intention of the framers of early American constitutions that the courts should have the power in cases coming regularly before them to declare acts of legislation unconstitutional where such acts clearly violated the constitution.

Of the three books, Professor Beard's is, on the whole, the most satisfactory. This is so because the book is based on the most exhaustive examination which has so far been made of the expressed opinions of the men who were most responsible for the adoption of the United States Constitution. Professor Beard's method of treating the

subject consists first in the selection of the names of the twenty-five men "whose character, ability, diligence and regularity of attendance separately or in combination, made them the dominant element in the convention." He then shows that of these twenty-five, seventeen expressed themselves directly or indirectly in favor of the power of the courts to declare acts of legislation unconstitutional.

Attention is also called to the fact that four of the conventions which ratified the Constitution were made aware that the judges would in all probability exercise the power in question. Professor Beard believes also that the adoption by the first Congress of the Judiciary Act is proof that Congress intended that the Supreme Court of the United States should have the power to declare unconstitutional both acts of Congress and of the State legislatures since that act expressly gives to that tribunal the power on writ of error to reëxamine and reverse or affirm the decisions of state courts, deciding against the validity "of a treaty or statute of or an authority exercised under the United States."

Finally Professor Beard endeavors to strengthen his case by reference to the expressed views of the judges of the Supreme Court as well as of the supporters of the new Constitution and it would seem succeeds in proving that Marshall's opinion in *Marbury* v. *Madison* may not properly be regarded as introducing any new principles into the constitutional law of the time.

While Professor Beard's book is the most thorough and satisfactory answer which has yet been made to the question whether the Supreme Court has usurped the power to declare acts of Congress unconstitutional, Professor McLaughlin's book supplements admirably Professor Beard's work. The author's wide historical knowledge and his habits of research have enabled him to make a real contribution to the subject. His book, however, is not devoted exclusively to the powers of the courts in our American system of constitutional law. As its title indicates it also considers the position of parties in our system of government. It further embraces an excellent chapter on the significance of written constitutions. From the point of view of a discussion of judicial power it suffers when compared with Professor Beard's book by reason of the fact that it is really a collection of papers and addresses published at different times or delivered on different occasions, which of necessity were not written with the idea of according to the present controversy a comprehensive and extensive treatment. His conclusions with regard to that controversy are conveniently summed up as follows at the end of his first paper: "In seeking for the historical background of judicial authority in America I have found it necessary to emphasize a series of fundamental principles which entered into the warp and woof of Revolutionary thinking. As I have said more than once, I am not attempting to make out that each one of these principles, or all of them, demand, by absolute logical necessity, the exercise of the power of the courts to refuse to be bound by legislative enactment. My contention only is that such were the antecedents and that some of these notions or principles were of surpassing influence in the minds of men of Revolutionary days. The chiefest among the principles I have given are these: first and foremost, the separation of powers of government and the independence of the judiciary, which led courts to believe that they were not bound in their interpretation of the constitution by the decisions of a collateral branch of the government; second, the prevalent

and deeply cherished conviction that governments must be checked and limited in order that individual liberty might be protected and property preserved; third, that there was a fundamental law in all free states and that freedom and God-given right depended on the maintenance and preservation of that law, an idea of the supremest significance to the men of those days; fourth, the firm belief in the existence of natural rights superior to all governmental authority, and in the principles of natural justice constituting legal limitations upon governmental activity, a notion that was widely spread and devoutly believed in by the young lawyers and statesmen of the Revolutionary days who were to become the judges of the courts and the lawyers that made the arguments; fifth, the belief that, as a principle of English law, the courts would consider that an act of Parliament contrary to natural justice or reason was void and pass it into disuse, a belief which was especially confirmed by the reference to Coke. Back of all of these ideas was a long course of English constitutional development in which judges had played a significant part in constitutional controversy. In English history courts had held an influential if not an absolutely independent position; Parliament itself had long played the role of a tribunal declaring existing law rather than that of a legislative body making new law. The principle of legislative sovereignty as a possession of Parliament was, on the other hand, a comparatively modern thing. To one at all familiar with the long course of human effort and the long series of political, theological, and philosophical discussion running through centuries of European history, the assertion of independent judicial power to maintain the fundamental law and to preserve individual liberty, even against the encroachment of legislative bodies, appears to be the natural product of the ages, finding place and opportunity for expression in a new and free country where people were making their institutions—making them, in part, consciously under the guidance of legal and philosophical precept, in part under the influence of great social and historical forces. No one can understand the rise of judicial authority unless he understands the nature and course of Revolutionary argument, the American inheritance of principles of individual right, and the seriousness with which men, in the midst of political turmoil, went back to fundamental principles of political philosophy and strove to make them actual."

The main service which Mr. Dougherty has rendered in his little book has consisted in setting forth in succinct and readable form the conclusions of others. He has formulated and defended the theory expressed by Hamilton in his writings and by Marshall in his opinions as to the attitude which must necessarily be assumed by the courts when they are called upon to apply an act of the legislature which they regard as violative of some constitutional provision. While all may not agree with Mr. Dougherty's conclusions, any one who reads his book will obtain with the minimum of labor a reasonably accurate idea both of the views whose adoption has resulted in the present height of judicial power as well as of the literature of the general subject which is set forth in copious foot notes.

The first stage in the controversy as to the historical justification of the judicial attitude with regard to legislation may be said to be closed. It is extremely doubtful whether any further reëxamination of historical documents or of the conditions obtaining at the end of the eighteenth century will result in adducing sufficient evidence to

offset the conclusion which would seem to be proven that the courts have not been usurpers but have, on the contrary, been exercising powers which to say the least were by implication given to them by the opinion of the period in which the exercise of those powers was assumed.

The closing of this, the first stage of the controversy, has not, however, had for its effect the ending of the controversy itself. For the decision that the fathers had at the end of the 18th century intended that the courts should have the power to declare unconstitutional acts of the legislature does not necessarily have for its effect the further conclusion that it is desirable that at the beginning of the 20th century the same extent of judicial power shall be recognized. In order that the historical justification of the position of the American judiciary shall have this effect we must assume first, that the fathers were right in the attitude which they took and second, that they had discovered a truth applicable to present conditions and times. These assumptions the opponents of the power have been unwilling to make. On the contrary, they have taken the position that the views of the fathers are not controlling upon the sons and grandsons who are at liberty to reconsider the paternal views in the light of present needs.

It is to this phase of the controversy that Mr. Ransom's book belongs. He has little patience with the view that what was good enough for the 18th is good enough for the 20th century and devotes his attention almost exclusively to a consideration of the methods proposed for remedying the evils which it is believed have developed as a result of the present judicial attitude. Until comparatively recently the method most commonly proposed for making legislation constitutional which had been declared by the courts to be unconstitutional was the amendment of the constitution. While this method has been commonly used in the case of state constitutions it has almost never been resorted to in the case of the United States Constitution. This is probably due to the fact that the Supreme Court of the United States has been both able and willing to treat that instrument as one, to describe it in the words of a justice of that court, "whose unchanging provisions are adaptable to the infinite variety of the changing conditions of our national life." Constitutional amendments in the states have been more frequent both because the attitude of many state courts towards the state constitution has been quite different from that of the justices of the United States Supreme Court towards the Constitution of the United States and also because of the comparatively easy methods of amending state constitutions.

The other methods which had until very recently been proposed were the taking from the state courts the power to declare acts of the legislature unconstitutional and the recall of judges by the people who elected them. Of these only the recall has been actually resorted to.

At a meeting of the recent constitutional convention of the State of Ohio, however, Theodore Roosevelt who had been invited to address the convention proposed a new method of limiting the power of the state courts to declare unconstitutional acts of the legislature, to which the name of the recall of judicial decisions has been commonly given. It is to the consideration of this proposal that Mr. Ransom's book is devoted.

In order that his readers may have before them an authentic statement of the Roosevelt proposal, Mr. Ransom has persuaded its author to write an introduction to the book now being noticed. Mr. Roosevelt defines his position in this introduction. He says: "My proposal is for

the exercise of the referendum or right of review, by the people themselves in a certain class of decisions of constitutional questions in which the courts decide against the power of the people to do elementary justice. When under the 'police power' or 'general welfare' powers of government the legislature passes an act to do social or industrial justice, and the state court declares that the law is unconstitutional, then I propose that the people themselves, the masters of both legislatures and court, shall after due deliberation decide which of their servants is to be sustained, so far as the particular act is concerned."

Mr. Ransom regrets that the name of "recall of judicial decisions" has been given to this proposal both because it confuses the proposition with the recall of judges, a totally different matter, and because it gives to the public the idea that Mr. Roosevelt has proposed that the method of appeal to the people from judicial decisions shall be applied not merely to all decisions on constitutional questions but as well to those in which constitutional questions are not involved. He considers that Mr. Roosevelt's proposal should be described as "The Direct Expression of the Popular Will as the Ultimate Guide in Determining the Scope of the Regulative or 'Police' Powers of the State Governments." Mr. Ransom considers that Mr. Roosevelt has made a remarkable contribution to American political thought and asks whether it is not "something of a reproach to the American bar and to its traditional position of leadership in all that pertains to our frame of government, that the most important proposal for constitutional change which has been made since the close of the war between the states should have been first brought to public attention by a layman and was at first dismissed with snap-judgment by many of the leaders of the bar"?

In analyzing and describing Mr. Roosevelt's proposal Mr. Ransom calls attention to the difference between the specific and general provisions of state constitutions and endeavors to show that the Supreme Court of the United States has taken the view that the general provisions such as those providing for due process of law do not prevent the use of the police power, to use the words of Mr. Justice Holmes "in aid of what is sanctioned by usage or held by the prevailing morality or the strong and preponderant opinion to be greatly and immediately necessary to the public welfare;" but that some of the state courts of which the New York Court of Appeals is cited as an example, take the view that "every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our constitutions were adopted."

Mr. Ransom contends that, if the view of the Supreme Court is the correct one, the question to be determined is not really in its nature a legal question so much as an ethical or political question which is properly to be determined by the people acting deliberately and with the desire to express prevailing ethical and social ideas.

Mr. Ransom attempts to make clear the nature of Mr. Roosevelt's proposal by showing that:

1. It has nothing to do with the United States Supreme Court or its decisions.

2. It would in no way weaken or impair the interpretation or enforcement of the guarantees of the Federal Constitution according to the meaning thereof declared by the Supreme Court of the United States.

3. It has nothing to do with any clause of any constitution which has a definite meaning.

4. It would not in any way repeal or amend or destroy the "due process" clause of any state constitution.

5. It has nothing to do with the "recall" of judges.

6. It has nothing to do with the "decision" or judgment in any suit.

Defined and limited in this way, Mr. Roosevelt's proposal is in Mr. Ransom's opinion the most sane and conservative method which has up to the present time been suggested for extricating us from the difficulties into which the people of this country believe, if we are to judge them by their actions, that we have been placed by our state courts in the exercise of their power to declare unconstitutional acts of the state legislatures. He prefers it to the recall of judges, for he asks why should we recall a judge merely because he has mistaken prevailing ethical and social ideas? Indeed he believes that its adoption "would do away with the conditions which may lead many of our States to adopt the 'recall' of judges." He prefers it, also, to the abolition of the power of judges to declare acts of state legislatures unconstitutional since he believes "it would be a misfortune in the minds of the most sagacious of American statesmen, if the problem that has been pointed out should lead to so radical and dangerous a step."

Finally, Mr. Ransom prefers the Roosevelt proposal to the present methods of constitutional amendment to which resort is so frequently had in the case of unpopular decisions on constitutional questions. In his opinion the amendment of such a general constitutional provision as the due process clause in order to escape the effects of an unpopular judicial decision has three rather definite results:

In the first place the way is opened not only for the re-enactment of the particular act held unconstitutional but also for the enactment of any other act no matter how oppressive or comprehensive dealing with the particular subject.

In the second place, by the adoption of a constitutional amendment creating an "exception" to the operation of the "due process" clause there may be grafted upon that great constitutional guaranty a provision of perhaps unforeseen and ambiguous meaning.

In the third place the adoption of a series of constitutional exceptions to meet particular decisions makes the Bill of Rights in the state constitutions a patchwork of exceptions and provisos.

For these reasons Mr. Ransom believes that the Roosevelt proposal is the best of the proposals which have recently been made for preventing the state courts from giving to general state constitutional provisions a meaning which is derived from a consideration of the past and which disregards the needs of the present. In his opinion this method is nothing more than a method of constitutional amendment applicable in concrete instances as they arise because of a difference of opinion between the state legislature and the state courts.

No particular treatment is given to the procedure for the submission of judicial decisions to the people, this being regarded as a detail which is to be fixed in accordance with the needs and desires of particular states as is the rule in the case of present methods of constitutional amendment, which vary very greatly in different states.

Whatever may be one's opinion as to the propriety and expediency of Mr. Roosevelt's proposal one cannot fail to admit that he has secured in Mr. Ransom an enthusiastic and capable supporter who in the little book under review has done much to make clear to the public what Mr. Roosevelt has really proposed under the catching but rather misleading title of "the recall of judicial decisions."

Frank J. Goodnow.